

SENATE BILL No. 33

DIGEST OF INTRODUCED BILL

Citations Affected: IC 14-8-2; IC 14-25-5.5.

Synopsis: Resolution of water diversion disputes. Creates a procedure for resolving surface water disputes. Provides that a person seeking redress for injuries caused to the person's property as a result of a diversion of the natural surface watercourse on a neighboring property may file a petition with the drainage board. Permits the drainage board to investigate, to hold a hearing on the petition, and to issue an order requiring the removal or remedy of the diversion. Permits a person who owns the land that is the subject of the petition to file an action in circuit or superior court to vacate the drainage board's order.

Effective: July 1, 1999.

Wheeler

January 6, 1999, read first time and referred to Committee on Natural Resources.



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Introduced

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

SENATE BILL No. 33

A BILL FOR AN ACT to amend the Indiana Code concerning natural and cultural resources.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 14-8-2-76.5 IS ADDED TO THE INDIANA CODE
2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 1999]: **Sec. 76.5. "Diversion", for purposes of IC 14-25-5.5, has**
4 **the meaning set forth in IC 14-25-5.5-1.**

5 SECTION 2. IC 14-8-2-79.1 IS ADDED TO THE INDIANA CODE
6 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
7 1, 1999]: **Sec. 79.1. "Drainage board", for purposes of IC 14-25-5.5,**
8 **has the meaning set forth in IC 14-25-5.5-2.**

9 SECTION 3. IC 14-8-2-176.5 IS ADDED TO THE INDIANA
10 CODE AS A **NEW** SECTION TO READ AS FOLLOWS
11 [EFFECTIVE JULY 1, 1999]: **Sec. 176.5. "Natural surface**
12 **watercourse", for purposes of IC 14-25-5.5, has the meaning set**
13 **forth in IC 14-25-5.5-3.**

14 SECTION 4. IC 14-8-2-195 IS AMENDED TO READ AS
15 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 195. "Owner" has the
16 following meaning:

17 (1) For purposes of IC 14-11-4, the meaning set forth in

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1 IC 14-11-4-2.

2 (2) For purposes of IC 14-15, a person who has the legal title to
3 a watercraft.

4 (3) For purposes of IC 14-16-1, the meaning set forth in
5 IC 14-16-1-6.

6 (4) For purposes of IC 14-16-2, the meaning set forth in
7 IC 14-16-2-5.

8 (5) For purposes of IC 14-25-4, the meaning set forth in
9 IC 14-25-4-4.

10 **(6) For purposes of IC 14-25-5.5, the meaning set forth in**
11 **IC 14-25-5.5-4.**

12 ~~(6)~~ (7) For purposes of IC 14-27-7, the meaning set forth in
13 IC 14-27-7-1.

14 ~~(7)~~ (8) For purposes of IC 14-36, the term includes the following:

15 (A) Owners in fee.

16 (B) Life tenants.

17 (C) Tenants for years.

18 (D) Holders of remainder of reversionary interests.

19 (E) Holders of leaseholds or easements.

20 (F) Holders of mineral rights.

21 ~~(8)~~ (9) For purposes of IC 14-37, a person who has the right to
22 drill into and produce from a pool and to appropriate the oil and
23 gas produced from the pool for:

24 (A) the person or others; or

25 (B) the person and others.

26 ~~(9)~~ (10) For the purposes of IC 14-22-10-2, the meaning set forth
27 in IC 14-22-10-2(c).

28 SECTION 5. IC 14-8-2-202 IS AMENDED TO READ AS
29 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 202. (a) "Person"
30 means, except as provided in subsections (b) through ~~(j)~~, (k), an
31 individual, a partnership, an association, a fiduciary, an executor or
32 administrator, a limited liability company, or a corporation.

33 (b) "Person", for purposes of IC 14-12-2, has the meaning set forth
34 in IC 14-12-2-3.

35 (c) "Person", for purposes of IC 14-16, IC 14-24, IC 14-26-2,
36 IC 14-28-1, IC 14-28-3, IC 14-29-6, and IC 14-38-2, means an
37 individual, a partnership, an association, a fiduciary, an executor or
38 administrator, a limited liability company, a corporation, other legal
39 entity, the state, or an agency, a political subdivision, or another
40 instrumentality of the state.

41 (d) "Person", for purposes of IC 14-12-1, IC 14-12-2, IC 14-20-1,
42 IC 14-21, IC 14-25 through IC 14-29, except as otherwise provided in

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1 this section, IC 14-33, IC 14-34, and IC 14-37, means an individual, a
 2 partnership, an association, a fiduciary, an executor or administrator,
 3 a limited liability company, a corporation, or a governmental entity.

4 (e) "Person", for purposes of IC 14-22-31.5, has the meaning set
 5 forth in IC 14-22-31.5-2.

6 (f) "Person", for purposes of IC 14-25-3, has the meaning set forth
 7 in IC 14-25-3-1.

8 **(g) "Person", for purposes of IC 14-25-5.5, has the meaning set**
 9 **forth in IC 14-25-5.5-5.**

10 ~~(g)~~ **(h)** "Person", for the purposes of IC 14-25-7, has the meaning set
 11 forth in IC 14-25-7-5.

12 ~~(h)~~ **(i)** "Person", for purposes of IC 14-34, means an individual, a
 13 partnership, a limited liability company, an association, a society, a
 14 joint stock company, a firm, a company, a corporation, or other
 15 business organization.

16 ~~(i)~~ **(j)** "Person", for purposes of IC 14-38-1, has the meaning set
 17 forth in IC 14-38-1-2.

18 ~~(j)~~ **(k)** "Person", for purposes of IC 14-24-12, has the meaning set
 19 forth in IC 14-24-12-4.

20 SECTION 6. IC 14-8-2-203.5 IS ADDED TO THE INDIANA
 21 CODE AS A NEW SECTION TO READ AS FOLLOWS
 22 [EFFECTIVE JULY 1, 1999]: **Sec. 203.5. "Petitioner", for purposes**
 23 **of IC 14-25-5.5, has the meaning set forth in IC 14-25-5.5-6.**

24 SECTION 7. IC 14-8-2-242.5 IS ADDED TO THE INDIANA
 25 CODE AS A NEW SECTION TO READ AS FOLLOWS
 26 [EFFECTIVE JULY 1, 1999]: **Sec. 242.5. "Respondent", for**
 27 **purposes of IC 14-25-5.5, has the meaning set forth in**
 28 **IC 14-25-5.5-7.**

29 SECTION 8. IC 14-8-2-281.7 IS ADDED TO THE INDIANA
 30 CODE AS A NEW SECTION TO READ AS FOLLOWS
 31 [EFFECTIVE JULY 1, 1999]: **Sec. 281.7. "Tract", for purposes of**
 32 **IC 14-25-5.5, has the meaning set forth in IC 14-25-5.5-8.**

33 SECTION 9. IC 14-25-5.5 IS ADDED TO THE INDIANA CODE
 34 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
 35 JULY 1, 1999]:

36 **Chapter 5.5. Regulation of Surface Water Disputes**

37 **Sec. 1. As used in this chapter, "diversion" means a condition**
 38 **that alters a natural surface watercourse. The term includes the**
 39 **following:**

40 **(1) Erecting a wall that keeps surface water from entering or**
 41 **leaving a person's property.**

42 **(2) Diverting or accelerating the flow of surface water.**



- (3) Erecting a downspout directed at the property line.
- (4) Paving a substantial portion of a formerly grassy lot.
- (5) Erecting a curb or retaining wall.
- (6) Managing surface water by any other method that causes damage to another person's property.

Sec. 2. As used in this chapter, "drainage board" means the following:

- (1) Except as provided in subdivision (2):
 - (A) the county board of commissioners, as provided in IC 36-9-27-5(a)(1); or
 - (B) the drainage board appointed by the board of commissioners under IC 36-9-27-5(a)(2).
- (2) In a county having a consolidated city, the board of public works of the consolidated city, as provided in IC 36-9-27-5(b).

Sec. 3. As used in this chapter, "natural surface watercourse" means an area of the surface of the ground over which water from falling rain or melting snow occasionally and temporarily flows in a definable direction.

Sec. 4. As used in this chapter, "owner" means a person who holds a possessory legal interest in land.

Sec. 5. As used in this chapter, "person" means an individual, a corporation, a limited liability company, a partnership, or any other legal entity.

Sec. 6. As used in this chapter, "petitioner" means a person who files a petition seeking redress for damages caused by a diversion under this chapter.

Sec. 7. As used in this chapter, "respondent" means an owner of a tract of land that is the subject of a petition seeking redress for damages caused by a diversion under this chapter.

Sec. 8. As used in this chapter, "tract" means an area of land that is:

- (1) under common fee simple ownership;
- (2) contained within a continuous border; and
- (3) a separately identified parcel for property tax purposes.

Sec. 9. (a) If:

- (1) a person who owns a tract of land seeks the removal or remedy of a natural surface watercourse diversion located outside the person's tract in order to promote better drainage of the person's tract; and
 - (2) the owner of the land on which the diversion is located, upon request, does not remove or remedy the diversion;
- the person seeking the removal or remedy of the diversion may file



1 a petition under this chapter.

2 (b) A petition filed under this section may request the drainage
3 board in the county in which the diversion is located to:

4 (1) remove or remedy the diversion; or

5 (2) authorize or order the removal of, or remedy of, the
6 diversion;

7 under this chapter.

8 Sec. 10. A petition filed by a person described in section 9(a)(1)
9 of this chapter must include the following:

10 (1) A general description of the tract of land owned by the
11 petitioner.

12 (2) A general explanation of the need for the removal of the
13 diversion and a list of other ways to remedy the damage
14 caused to the land owned by the petitioner if removal of the
15 diversion is not practical.

16 (3) A general description of the location of the diversion and
17 how the diversion operates.

18 Sec. 11. The drainage board may require, as a condition of filing
19 a petition under this chapter, the payment of a filing fee. The
20 drainage board may not set the filing fee at an amount greater than
21 is reasonably necessary to defray the expenses incurred by the
22 board in processing a petition.

23 Sec. 12. (a) If a petition filed under this chapter alleges the
24 diversion of a natural surface watercourse, the county surveyor of
25 the county in which the diversion is alleged to exist shall promptly
26 investigate whether the diversion:

27 (1) exists; and

28 (2) causes damage to the petitioner's property.

29 (b) If the county surveyor, upon investigation, finds an existing
30 natural surface watercourse diversion in the location alleged in the
31 petition, the county surveyor shall report to the drainage board the
32 existence of the diversion and any damage that the diversion
33 appears to be causing.

34 (c) Upon receiving a report from the county surveyor under
35 subsection (b), the drainage board shall:

36 (1) set a date for a hearing on the petition; and

37 (2) serve notice of the hearing on each owner of the land on
38 which the diversion exists who can be identified in the records
39 of the county recorder.

40 (d) The hearing must be held at least thirty (30) days but less
41 than ninety (90) days after the date of the filing of the petition.

42 (e) Notice of a hearing must be served on each respondent in the

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manner prescribed in:

- (1) Rule 4.1 of the Indiana Rules of Trial Procedure, in the case of a respondent who is an individual; or
- (2) Rule 4.6 of the Indiana Rules of Trial Procedure, in the case of a respondent that is an organization.

Sec. 13. Before or on the date of a hearing held under this chapter, the drainage board may postpone and reschedule the hearing if:

- (1) it appears that a respondent has not been served with notice; or
- (2) the interests of fairness otherwise compel a postponement.

Sec. 14. (a) If, after a hearing held under this chapter, the drainage board finds that:

- (1) the diversion of a natural surface watercourse that is alleged in the petition exists; and
- (2) the removal or remedy of the diversion will:
 - (A) promote better drainage of the petitioner's land; and
 - (B) not cause unreasonable damage to the land of the respondents;

the drainage board shall find for the petitioner.

(b) If, after a hearing held under this chapter, the drainage board is unable to make the findings described in subsection (a), the drainage board shall deny the petition.

Sec. 15. If the drainage board finds for the petitioner under section 14(a) of this chapter, the board shall determine, based upon a preponderance of the evidence, whether the respondent acted unreasonably in creating the diversion.

Sec. 16. (a) If the drainage board finds:

- (1) for the petitioner under section 14(a) of this chapter; and
- (2) under section 15 of this chapter that at least one (1) of the respondents acted unreasonably in creating the diversion;

the drainage board shall enter an order directing the respondents to remove or remedy the diversion at the expense of the respondents or directing the county surveyor to remove or remedy the diversion at the expense of the respondents.

(b) A respondent against whom an order is entered under subsection (a) is subject to an action under section 20 of this chapter if the respondent fails to pay the amount for which the respondent is responsible under the order.

Sec. 17. If the drainage board:

- (1) finds for the petitioner under section 14(a) of this chapter; and



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(2) does not find under section 15 of this chapter that the respondent acted unreasonably in creating the diversion; the drainage board shall enter an order under section 18 of this chapter concerning the removal or remedy of the diversion.

Sec. 18. (a) Upon a determination made under section 17 of this chapter, the drainage board shall enter an order:

(1) authorizing the petitioner to remove or remedy the diversion;

(2) authorizing the respondents to remove or remedy the diversion;

(3) directing the county surveyor to remove or remedy the diversion; or

(4) directing that the diversion be removed or remedied through the joint efforts of at least two (2) of the persons referred to in this subsection.

(b) The drainage board shall consult with the:

(1) petitioner;

(2) respondents; and

(3) county surveyor;

before deciding whether to enter an order under subsection (a)(1), (a)(2), (a)(3), or (a)(4).

(c) If the drainage board enters an order under subsection (a), the order may:

(1) require the petitioner to bear the expenses of removing or remedying the diversion, including the monetary value of the harm and inconvenience that the respondents will incur as a result of the removal or remedy of the diversion; or

(2) apportion responsibility for the expenses of removing or remedying the diversion among all the owners of a tract that is the subject of an order.

Sec. 19. In entering an order concerning the removal of a diversion under this chapter, the drainage board may:

(1) provide for the costs of the removal work to be paid directly by one (1) or more of the persons subject to the order; or

(2) authorize an advance on the general drain improvement fund established in the county under IC 36-9-27-73 for the payment of the costs of the removal work and provide for the amount advanced to be reimbursed by one (1) or more of the persons subject to the order.

Sec. 20. (a) If a person who is required by an order of a drainage board under this chapter to pay an amount or bear an expense



1 does not comply with the order, the amount for which the person
2 is responsible may be recovered by:

- 3 (1) the drainage board, as custodian of the general drain
4 improvement fund, if the amount was advanced from the
5 general drain improvement fund; or
6 (2) another person subject to the order who has paid the
7 amount and is entitled to reimbursement.

8 (b) An amount may be recovered from a person under
9 subsection (a) through an action in a court having jurisdiction in
10 the same manner that a creditor may recover an amount owed
11 under a contract. In an action brought under this subsection, the
12 plaintiff may also be awarded costs and reasonable attorney's fees.

13 Sec. 21. (a) If the drainage board finds for a petitioner after a
14 hearing held under this chapter, a respondent may file an action in
15 the circuit or superior court of the county in which the alleged
16 diversion exists seeking to have the order entered by the drainage
17 board vacated.

18 (b) An action filed under subsection (a) must be based on at least
19 one (1) of the following assertions by the respondent:

- 20 (1) The drainage board lacked authority to act under this
21 chapter.
22 (2) The drainage board erred in making the findings
23 described in section 14(a) of this chapter.
24 (3) The respondent should have been awarded compensation
25 for harm and inconvenience, or the amount awarded to the
26 respondent for harm and inconvenience is insufficient.
27 (4) The drainage board did not follow the procedure required
28 by this chapter.

29 Sec. 22. (a) In an action filed under section 21 of this chapter,
30 the court:

- 31 (1) shall enter an order vacating the order of the drainage
32 board directing the county surveyor to remove or remedy the
33 diversion; and
34 (2) may issue an injunction against the removal or remedy of
35 the diversion;

36 if the court makes a finding under subsection (b).

37 (b) The court is required or authorized to act under subsection
38 (a) if the court finds that the drainage board:

- 39 (1) was clearly in error in making its findings under section
40 14(a) of this chapter with respect to the alleged diversion; or
41 (2) exceeded its authority or discretion under the law in
42 authorizing the removal or remedy of the diversion.



1 **Sec. 23. (a) For purposes of this chapter:**

2 **(1) a county surveyor;**

3 **(2) a member of a drainage board; or**

4 **(3) an authorized representative of a county surveyor or**
 5 **drainage board;**

6 **has a right of entry over and upon a tract of land that is the subject**
 7 **of a petition filed under this chapter.**

8 **(b) The right of entry granted by this section is limited to the**
 9 **land lying within seventy-five (75) feet of the alleged diversion.**

10 **(c) A person exercising a right of entry under this section shall,**
 11 **to the extent possible, use due care to avoid damage to:**

12 **(1) crops, fences, buildings, and other structures located**
 13 **outside the right-of-way; and**

14 **(2) crops and approved structures located inside the**
 15 **right-of-way.**

16 **(d) Before exercising a right of entry under this section, an**
 17 **individual must give oral or written notice of the entry on the land**
 18 **to the property owner of record. The notice must state the purpose**
 19 **for the entry.**

20 **(e) A right of entry under this section is not criminal trespass**
 21 **under IC 35-43-2-2, and an individual exercising a right of entry**
 22 **under this section may not be arrested or prosecuted for criminal**
 23 **trespass under IC 35-43-2-2.**

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